Supreme Court, U.S.
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No. 99-1183

IN THE

Supreme Court of the United States

KARL ALAN SHULTZ,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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The State of Washington, represented by John D. Knodell III, Prosecuting Attorney in and for Grant County Washington, responds to the *Shultz* Petition for Writ of Certiorari (hereinafter Petition).

STATEMENT OF THE CASE

Respondent takes no exception to Petitioner's Statement of the Case except to note that Petitioner was ordered to pay restitution in the amount of $507,131.62 to some 20 owners of property burned by the arson for which Petitioner was found guilty (Petition App. 7a-9a), that total restitution remaining unpaid on the date the trial court was requested to extend jurisdiction was $496,987.04 (*Id.* at 15a) and the restitution was ordered in the trial court's Judgement and Sentence to commence November 1, 1987 (*Id.* at 10a), not April 7, 1987. (Petition 3)

REASONS FOR DENYING THE WRIT

The fact that the Washington State Supreme Court ". . . cited no federal case law on any of the issues other than the bill of attainder question . . ." (Petition 6) is no valid legal or other reason for granting this Petition. The Washington Supreme Court in its decision considered the provisions of both the Federal and State Constitutions saying "Legislation violates the ex post facto clauses of the state and federal constitutions when it imposes punishment on an act which was not punishable at the time the act was committed, or when it increases the quantum of punishment for the crime after the crime was committed." (Petition App. 21a)

A. Ex Post Facto

Petitioner says

> The extension of the sentencing court's criminal jurisdiction did not result from any violation of the petitioner's conditions of sentence or for failure to meet his court ordered restitution payments under his judgment and sentence. It resulted only by virtue of the later passage of the 1994 and 1997 amendments to RCW 9.94A.142 (App., *infra*, 32A-36A).

(Petition 7) That extension did result from Petitioner's ". . . failure to meet his court ordered payments . . ." Had Petitioner made all of his court ordered payments, this case would not have been taken to the Grant County Washington Superior Court nor to the Washington Supreme Court which granted extension of time for Petitioner's restitution payments. Yes, it resulted also, *but not only*, ". . . by virtue of the later passage of the 1994 and 1997 amendments to RCW 9.94A.142." (*Id.*)

Petitioner also says

> Regardless of the division between the circuits, petitioner submits that under case law of any and all of the circuit courts, the Washington State 1994 and 1997 amendments would ". . . run afoul of the *ex post facto* clause . . ." since "1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant . . ."

(*Id.*) This court early held in *Calder v. Bull*, 3 Dall 386, 1 L. Ed. 648 (1748):

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes* the *punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*. *Id.* at 390, 1 L. Ed. 648 (emphasis in original).

and in *Beazell v. Ohio*, 269 U.S. 167, 70 L. Ed. 216, 46 S. Ct. 68 (1925):

* * *

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. Id., at 169-170, 70 L Ed 216, 46 S Ct. 68.

Both citations from *Collins v. Youngblood*, 497 US 37, 111 L. Ed. 2d 30, 43, 110 S. Ct. 2715 (1990). To the same effect, *see* Petition App. 21a.

The Washington Supreme Court considered fully each of the means by which a criminal statute is deemed to be an ex post facto law. It discussed whether RCW 9.94A.142 ". . . punishes as a crime an act previously committed, which was innocent when done . . ." at Petition App. 21a-23a. That Court convincingly holds restitution is remedial (*Id.* at 21a), even if deemed punitive it is not ex post facto (*Id.* at 22a), does not increase Petitioner's punishment (*Id.* at 22a-23a) and does not increase the severity of any restrictions of his constitutional freedoms. (*Id.* at 23a)

Petitioner cites *United States v. Johnson*, 181 F.3d 105 (1999) and decisions contrary. (Petition 7) *Johnson* involved a trial court order sentencing Johnson to eighteen months imprisonment plus an new term of twelve months supervised release. Johnson claims the new term of supervised release violates the ex post facto clause. Other Circuit Court opinions to the contrary are cited. (181 F.3d 105). A term of supervised release, resulting in imprisonment if terminated, may result in actual additional incarceration which is clearly punishment. Extension of time to pay restitution to those whose property is damaged or destroyed by Petitioner's arson is, as the Washington Supreme Court clearly demonstrates, not punishment. (Petition App. 21a-23a) Two recent United States Court of Appeals decisions subject to certiorari in this Court agree. In *Jones v. Garner*, 164 F.3d 589 (1999), USCA 11, No. 97-9009, the Court of Appeals held regulations extending the time for reconsideration of parole violated the ex post facto clause saying (164 F.3d at 590):

> The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law. . . ." U.S. Const. Art. I, § 10, cl. 1. At the time of the drafting of the Constitution, the phrase " 'ex post facto

> law' was a term of art with a well-established meaning." *Akins v. Snow*, 922 F.2d at 1560. In *Calder v. Bull*, 3 U.S. (Dall.) 386, 1 L. Ed. 648 (1798), the Supreme Court "identified several legislative acts that clearly implicated the core concerns" with respect to ex post facto laws that existed at the time the Constitution was written. *Akins*, 822 F.2d at 1560-61. Included in such legislative acts was any law ". . . that *changes the punishment, and inflicts a greater punishment*, than the law annexed to the crime, when committed." *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) At 390 (emphasis in original)). The Supreme Court's ex post facto rulings have continued to adhere to the original principle that laws with this effect violate the Constitution's ex post facto prohibition.

In *Carmel v. State of Texas*, 963 S.W.2d 833 (1998), the Court of Appeals held amending a statute providing conviction of a sexual offense on a minor child on the uncorroborated testimony of the victim if *disclosed* within six months, which eliminated the six month trial requirement was not ex post facto, saying (963 S.W.2d at 836):

> That statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely "removes existing restrictions upon the competency of certain classes of persons as witnesses" and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210, 28 L.Ed. 262, 269 (1884). Further, there is no showing that the legislature intended that article 38.07 not be a rule

> of procedure and apply as of the date of the offense. *See Generally Lindquist v. State*, 922 S.W.2d 223, 227 n. 4 (Tex-App. — Austin 1996, pet. ref'd.). As a rule of procedure, it applied to pending and future prosecutions.

In *Jones v. Garner*, potential elimination of reduction of incarceration is involved; in *Carmel v. State of Texas*, a rule of procedure, as in the case at bar, is involved.

There is simply no valid justification for holding RCW 9.94A.142 ex post facto.

B. Altering Standard of Punishment

Petitioner says the Washington Legislature intended to inflict punishment by enacting RCW 9.94A.142. In support of this claim he cites testimony to the Washington Legislature of one Debbie Wilki

> . . . a spokesperson . . . for the Washington Association of County Officials, after noting that the 1997 amendment was the result of "extensive collaboration with the Prosecuting Attorney's Association, Department of Corrections and court personnel," testified that the bill's primary purpose is "not to make money" but to hold criminals responsible for the punishment imposed by the Court and to reimburse victims.

(App., *infra*, 41a-43a) Note that this witness said of this statute ". . . it's holding criminals accountable for what they, uhh, punishment that's imposed by the court and *it's to reimburse victims that's the primary purpose of doing it*."

(*Id.* at 41a-42a, emphasis supplied) as the Washington Supreme Court says, "In fact, restitution payments are paid to the superior court clerk and dispersed directly to the victims, not to the State. Given this direct connection to victims' losses, restitution also contains a strong remedial component." (*Id.* at 21a)

Petitioner says ". . . the statutory scheme is also so punitive in purpose and effect 'to create punishment.' " citing *Kansas v. Hendricks* 521 US 456, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). (Petition 8) The Washington Supreme Court demonstrated, citing ample authority, that ". . . extension of time for the enforcement of an existing restitution order does not increase punishment." (Petition App. 23a) See also that entire portion of the Supreme Court opinion from App. pages 21a through 23a.

Petitioner cites *Lynce v. Mathews*, 519 US 433, 137 L. Ed. 2.d 63, 117 S. Ct. 891 (1997) to the assertion that "Retroactively increasing criminal jurisdiction to modify the amount, terms and conditions of restitution, and to enforce by further incarceration denies an offender fair notice of the extent of the penalty for committing arson and leaves governmental power unrestrained." (Petition 8) *Lynce* involved a statute which canceled a prisoner's provisional early release credits. Cancellation of those early release credits eliminated any possibility of early release, thus assuring the prisoner's incarceration for the full period of the criminal sentence. That clearly would add penal punishment that otherwise had been subject to reduction. Extending Petitioner's time for restitution involves *no* criminal punishment, only more time for restitution of damage caused by Petitioner's criminal arson.

Petitioner says the amendments to RCW 9.94A.142 have ". . . the express effect of extending the criminal sentence by an additional ten (10) years during which the petitioner was faced with the possibility or potential of imposition of incarceration for failure to make payments." (Petition 9) Petitioner errs. Those amendments as used in the case before this Court only extend the period for restitution during which Petitioner is faced with potential incarceration for failure to make *restitution* payments.

C. Due Process Question

Petitioner says he had a ". . . reasonable expectation that restitution would last for only ten (10) years, and the summary change of the court's authority to impose restitution prevents Mr. Shultz's plea from being knowing, voluntary, and intelligently made." (Petition 9) The Washington Supreme Court clearly and fully responds to Petitioner's due process argument pointing out that " Shultz had only a mere expectation that the court's jurisdiction over his restitution order would expire on a particular date." (Petition App. 24a, *see also* 24a-25a)

D. Double Jeopardy Question

As the Washington Supreme Court points out

> Because the 1994 and 1997 amendments do not inflict punishment, they also fail to implicate the double jeopardy clauses of the Fifth Amendment and article I, section 9 of our state constitution. Double jeopardy protects a defendant from multiple punishments for the same offense. *Hennings*, 129 Wn.2d at 528. Shultz has never

> suffered more than one restitution punishment for his string of arsons. The 1994 and 1997 amendments do not impose further punishment for those crimes, so double jeopardy is not implicated.

(Petition App. 25a)

Petitioner says ". . . the amendment would increase the punishment of a sentence that was correct when entered . . . The 1997 amendment allows the court to modify not only the amount, but the terms and conditions of restitution." (Petition 10) That is simply not true. The amendment at issue here, as demonstrated above, does *not* increase Petitioner's punishment. Nor does it modify the amount, nor the terms or conditions, of restitution. As demonstrated, it simply and only adds ten years to the time within which Petitioner is required to pay the restitution ordered in the original Judgment and Sentence. (Petition App. 5a-10a)

E. Bill of Attainder Question

Petitioner says "The 1997 amendment inflicts punishment upon Mr. Shultz." (Petition 11) Here again, the Washington Supreme Court clearly and convincingly explains:

> The same constitutional sections prohibiting ex post facto legislation also prohibit bills of attainder. *See* U.S. CONST. § 10; Const. art. I, § 23. This constitutional protection "prohibit[s] legislatures from singling out disfavored persons and meting out summary punishment for past conduct." *State v. Hennings*, 129 Wn.2d 512, 527,

919 P.2d 580 (1996) (citing *Landgraf v. USI film Prods.*, 51 1 U.S. 244, 114 S. Ct. 1483, 1497, 128 L. Ed.2d 229 (1994). A statute violates this constitutional protection if it singles out named individuals or an easily ascertainable group and inflicts punishment without a judicial trial. Id. Legislation does not rise to the level of a bill of attainder if it merely requires a defined group to "bear burdens which the individual or group dislikes..." *State v. Manussier*, 129 Wn.2d 652, 666, 921 P.2d 473 (1996) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 470, 97 S. Ct. 2777, 53 L. Ed.2d 867 (1977)).

The 1994 and 1997 amendments to RCW 9.94A.142 are not bills of attainder because, as discussed above, they do not inflict punishment. The amendments may be burdensome, but do not add to a defendant's punishment as originally imposed by the sentencing court. Restitution was imposed in 1987, and the amendments do not alter the original obligation. *See Hennings,* 129 Wn. 2d at 527 (finding an amendment to the restitution statute "does not inflict punishment" because "[r]estitution was already required under the SRA, RCW 9.94A.142.").

CONCLUSION

There is no merit in this Petition for Certiorari. It should be denied.

Respectfully submitted,

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